Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Implementation of the Local	)	
Competition Provisions in the	)	CC Docket No. 96-98
Telecommunications Act of 1996	)	
(Access to Rights-of-Way)	)	

JOINT COMMENTS OF UTC AND THE EDISON ELECTRIC INSTITUTE

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Summary

The FCC has adopted the current *NPRM* to implement the local competition provisions contained in Section 251 of the Telecommunications Act of 1996. Section 251(b)(4) imposes upon Local Exchange Carriers the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224" (the Pole Attachment Act as amended by the 1996 Act). It should be noted that while the primary focus of this proceeding is on telecommunications carriers, the policies adopted regarding the pole attachment access provisions of Section 224 will also apply to poles, ducts, conduits and right-of-way owned by investor owned utilities.

Given the direct impact of these rules on the nation's investor owned utilities it is essential that in implementing the amendments to Section 224 that the Commission recognize that utilities design, own and maintain poles and other distribution facilities as an integral part of their obligation to provide reliable, safe and affordable electric service to the public. Third-party telecommunications attachments to utility facilities are an incidental use that should not be allowed in any way to undermine or detract from the primary purpose of these facilities -- the delivery of reliable electric service. Congress explicitly recognized this point in adopting new section 224(f)(2) which allows a utility to deny access for reasons of insufficient capacity, safety, reliability or generally applicable engineering requirements.

In addition, the Commission should distinguish between the relative need to compel access to the facilities of different types of utilities. While it is arguably necessary to provide access to LEC facilities in order to eliminate unfair competitive advantages that they currently enjoy as incumbent carriers, the same competitive importance cannot be assigned to attachments of electric utilities that do not directly compete in the provision of telecommunications services.

Consistent with Telecommunications Act's emphasis on market forces and deregulation the FCC's rules and policies should encourage facility owners and attaching entities to attempt to mutually resolve attachments issues through the use of negotiations. In no event should the FCC's rules abrogate existing contracts or discourage agreements relating to terms and conditions of access to be negotiated in the future.

In crafting its rules the Commission must recognize that old assumptions about the ability of utilities to absorb additional costs and burdens are outdated. The utility industry is currently under-going a dramatic restructuring in which competitive pressures have eliminated any margin to withstand the negative impacts on reliability and quality of service that could arise from an overbroad interpretation of the pole attachment legislation by the FCC.

As noted by the Commission, Section 224 requires that the FCC act to ensure that pole attachment terms and conditions are just and reasonable. Given the diversity of individual utility and attaching-entity circumstances, it is highly impractical to attempt to prescribe one set of specifics for all potential future attachment situations. Variations in regional weather patterns and differences between state laws regarding the permissible

use of rights of way are just some of the more serious factors preventing one national rule for particular issues related to access or notice. Thus, the most productive approach for the Commission to take at this time is to address procedures for resolving disputes when they arise, if disputes play out all the way "to the door" of the Commission. In this way, the Commission can meet the requirements of the 1996 Act without hobbling the natural evolution of the new commercial and physical relationships which need to develop as a result of the 1996 Act.

The guiding principle for any Commission activity in this area should be similar treatment under similar circumstances for all attaching entities. Utilities may or may not be existing or potential competitors in any particular market. If they do not and will not provide telecommunications service, a facility owner has little reason to treat one attaching entity "worse" than another. On the other hand, there can be compelling reasons for a facility owner to treat different attaching entities in different ways, such as when they are in completely different market niches, and particularly if they are seeking to attach to different types of facility or at differing locations, even if one such entity is a subsidiary of the facility owner.

Therefore, the overriding question which the Commission must address in any dispute is whether the facts at issue in a particular dispute justify differing treatment. This is just the type of matter which is least amenable to pre-defined rules and regulations, and most appropriate for case-by-case consideration, particularly in a new or newly redefined market. If, in the experience of the Commission, consistent themes or standard issues and circumstances begin to develop, rulemaking remains an option for the future.

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Pursuant to Section 1.415 of the Commission's Rules, UTC, The Telecommunications Association,[1] and the Edison Electric Institute (EEI) hereby submit their Joint Comments on certain of the issues raised in the Notice of Proposed Rulemaking, FCC 96-182, released April 19, 1996 (NPRM), in the above-captioned matter. Specifically, the Joint Commenters will address the issues raised at paragraphs 220-225 of the NPRM relating to access to rights-of-way by telecommunications service providers.[2]

UTC, The Telecommunications Association (UTC), is the national representative on communications matters for the nation's electric, gas and water utilities and natural gas pipelines. Over 1,000 such entities are members of UTC, and include investor-owned utilities, municipal electric systems, rural electric cooperatives, and natural gas distribution and transmission companies.

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[1] UTC was formerly known as the Utilities Telecommunications Council.

[2] Pursuant to paragraph 290 of the NPRM, UTC is filing comments separately from those relating to the principal issues in this docket.

Edison Electric Institute (EEI) is the association of the United States investor-owned electric utilities and industry associates worldwide. As of October 1995, EEI's U.S. members served 99 percent of all customers served by the shareholder-owned segment of the U.S. industry, generated approximately 79 percent of all the electricity generated by electric utilities, and serviced 76 percent of all ultimate customers in the nation. EEI frequently represents its U.S. members before Federal agencies, courts, and Congress in matters of common concern.

As the principal representatives of the utilities directly impacted by the Commission's interpretation and implementation of the Pole Attachment Act , 47 U.S.C. Section 224, as amended by the Telecommunications Act of 1996, both UTC and EEI have a direct interest in this proceeding and are pleased to offer the following comments.

I. Introduction

The FCC has adopted the current *NPRM* to implement the local competition provisions contained in Section 251 of the Telecommunications Act of 1996. Section 251(b)(4) imposes upon Local Exchange Carriers the "duty to afford access to the poles, ducts, conduits, and rights-of-way of such carrier to competing providers of telecommunications services on rates, terms, and conditions that are consistent with section 224" (the Pole Attachment Act as amended by the 1996 Act). It should be noted that while the primary focus of this proceeding is on telecommunications carriers, the policies adopted regarding the pole attachment access provisions of Section 224 will also apply to poles, ducts, conduits and right-of-way owned by investor owned utilities.

Given the direct impact of these rules on the nation's investor owned utilities it is essential that in implementing the amendments to Section 224 that the Commission recognize that utilities design, own and maintain poles and other distribution facilities as an integral part of their obligation to provide reliable, safe and affordable electric service to the public.[3] Third-party telecommunications attachments to utility facilities are an incidental use that should not be allowed in any way to undermine or detract from the primary purpose of these facilities -- the delivery of reliable electric service.

In crafting its rules the Commission must recognize that old assumptions about the ability of utilities to absorb additional costs and burdens are outdated. The utility industry is currently under-going a dramatic restructuring in which competitive pressures have eliminated any margin to withstand the negative impacts on reliability and quality of service that could arise from an overbroad interpretation of the pole attachment legislation by the FCC.

As noted by the Commission, Section 224 requires that the FCC act to ensure that pole attachment terms and conditions are just and reasonable. Given the diversity of individual utility and attaching-entity circumstances, it is highly impractical to attempt to prescribe one set of specifics for all potential future attachment situations. The most productive approach for the Commission to take at this time is to address procedures for resolving disputes when they arise, if disputes play out all the way "to the door" of the Commission. In this way, the Commission can meet the requirements of the 1996 Act

[3] While these comments primarily address attachments to electric utility facilities the same considerations should apply to the protection of gas utility facilities

without hobbling the natural evolution of the new commercial and physical relationships which need to develop as a result of the 1996 Act.

The guiding principle for any Commission activity in this area should be similar treatment under similar circumstances for all attaching entities. There can be compelling reasons for a facility owner to treat different attaching entities in different ways, such as when they are in completely different market niches, and particularly if they are seeking to attach to different types of facility or at differing locations, even if one such entity is a subsidiary of the facility owner.

Therefore, the overriding question which the Commission must address in any dispute is whether the facts at issue in a particular dispute justify differing treatment. This is just the type of matter which is least amenable to pre-defined rules and regulations, and most appropriate for case-by-case consideration, particularly in a new or newly redefined market. If, in the experience of the Commission, consistent themes or standard issues and circumstances begin to develop, rulemaking remains an option for the future.

II. Mandatory Access May Constitute An Unconstitutional Taking of Property

As the Commission notes in its *NPRM*, prior to the 1996 Act there was no requirement that facility owners provide access to attaching entities.[4] However, the Commission has concluded (id.) that the Act now requires all facility owners to provide access to such entities as telecommunications carriers or cable television systems. This

[4] *NPRM*, para. 220.

conclusion, whether or not an accurate interpretation of the Act, raises serious constitutional questions, regarding at least, the taking of property without just compensation.

This proposed rulemaking does not address the issue of compensation for access. Therefore, in commenting herein, EEI and UTC do not concede either that the Commission has correctly interpreted the Act regarding access or compensation, or that the Act's access provision is constitutional.

III. "Non-Discriminatory Access"— Section 224(f)

In examining the "nondiscriminatory access" provision, the FCC seeks comment on the extent which a LEC must provide access to poles, ducts, conduits, and rights-of-way on similar terms to all requesting telecommunications carriers, and whether those terms must be the same as the carrier applies to itself or an affiliate for similar uses. At the outset of this analysis the FCC must distinguish between the operational and policy implications of requiring non-discriminatory access to LEC facilities and requiring non-discriminatory access to electric utility facilities.

In general, the question of reasonable *versus* unreasonable discrimination must be held to an analysis of particular facts, based on a reasonable interpretation of all permissible-use, engineering and safety standards, regulations, and other requirements applicable to the particular situation at hand. For instance, there is no practical way for the Commission to determine in advance that a facility owner must accept every request to allow the overlashing of fiber-optic cable on an attaching entity's existing cable simply

because a similar type of cable (at the same or a different location) has been overlashed. There are simply too many case-specific questions regarding such matters as clearance requirements, local franchises, ordinances, and regulations, land-use requirements, the strength of the existing cable attachments, the remaining strength of the poles, the pre-existing agreement for the original attachments, and even the purpose of additional equipment.

A. "Non-discriminatory access" must mean similar access under similar circumstances, in light of all the facts

As a fundamental matter, access issues must be resolved on a case-by-case basis. The Commission should narrowly interpret the access requirement of Section 224(f) by focusing on the underlying focus of the 1996 Act: the prevention of unreasonable discrimination. Differing treatment to reflect different circumstances must be allowable. Just because access has been afforded to some facility does not mean that it must be afforded to all facilities. For instance, it must be permissible to grant access on a "first-come/first-served" basis.

Also, where there is no provision of service to the public, or a broad segment of the public, there is no "market entry" rationale which justifies compelling a facility owner to provide access. For instance, there can be no unreasonable discrimination if no one is allowed access. If a utility has not afforded any access to a pole, duct or conduit for an attachment to provide cable or other telecommunications service, the Act's access provision simply should not be triggered. Moreover, attachments used for purely internal utility communications (including, fiber networks used to manage and coordinate the safe

provision of utility service) must not trigger an access obligation, because internal communications facilities pose no economic impediment or other hindrance to competition or market entry by telecommunications service providers. The same result should apply if the utility is merely acting as an infrastructure provider, such as by providing facilities to telecommunications providers.

B. Consideration of similar access based on similar uses must reflect all circumstances, particularly the actual impact on facilities and legal restrictions on easement use

Determinations of similar use must reflect the actual physical use of the facility in question. It must not be taken to mean simply a consideration of the telecommunications services to be provided. For instance, while it is envisioned that local telephone competition will entail a variety communications media and hybrid systems that seamlessly offer service to the end user, the physical attachment requirements of these individual components may have widely disparate facility impacts. For example, a single co-axial cable attachment provides far less surface for ice and wind loading than a fiber line than it is overlashed and wrapped around another attachment. Coaxial cable, copper phone lines and fiber optics may also require different allocations of energized "supply" space and "communications" space. Likewise, systems that require amplifiers, signal boosters, dedicated power supplies or other electronics all have unique attachment implications.

In addition, the underlying rights of property owners may prevent certain facilities from being used as desired by a potential attaching entity. For example, easements

granted to utilities by private property owners may strictly limit the permissible uses of those easements. A common form of such restriction is one that allows an electric utility the use of an easement only for the delivery of electricity. Similar limitations also arise from state law regarding the use of rights-of-way, howsoever obtained (*i.e.*, purchase or condemnation).

C. There are clear and legitimate bases for distinguishing conditions of access to utility facilities

The FCC seeks comment on specific reasons of safety, reliability, and engineering purposes, upon which access could be denied consistent with section 224(f)(1) and 251(b)(4). While this may be an appropriate starting point for examining access to LEC facilities, the FCC must recognize that for electric utilities section 224(f)(2) must necessarily control the analysis.[5] Section 224(f)(2) acknowledges that utilities may have reasonable, facility-related reasons for denying access. Whatever may be the full extent of the access requirements for local exchange carriers, Congress has recognized that the access requirements applicable to utilities are more limited.

1. National codes, state requirements, and local utility practices regarding safety, reliability, and engineering all bear on whether access can be reasonably denied consistent with section 224(f)(2)

National codes, state requirements, and local utility practices regarding safety, reliability, and engineering all bear on whether access can be reasonably denied consistent with section 224(f)(2). For instance, if the proposed attachment would endanger the reliability of electric service, or the safety of anyone working on or around

[5] Similar standards should also apply to gas utilities.

the original equipment (or the attachment), or the safety of the general public, a facility owner must be able to deny access. For example, working in underground electric facilities can involve electrical shock hazards between four and seven times greater than working on electric distribution poles, and in a much more confined space. Numerous similar complications arise under applicable safety standards, including the National Electrical Safety Code, the National Electrical Code, the Occupational Safety and Health Administration requirements, state and local safety and facility regulations, and owner-specific standards which reflect design and operational practices, local weather extremes, and local public activities such as industrial traffic, use of farm equipment, etc.

2. There are no specific standards which could be used to determine in advance for all facility owners when there is "insufficient capacity" to permit access

The FCC seeks comments on specific standards under section 224(f)(2) for determining when an electric utility has "insufficient capacity" to permit access. Determinations of capacity sufficiency must be made on a case-by-case basis — in some cases, even on a facility-by-facility basis. Primarily this question involves a consideration of whether codes, standards, or regulations would support an argument that there is sufficient space, safety, or strength today. Moreover, facility owners often have constructed reserve space, and/or facilities of increased strength, to accommodate their own planned facility expansion. Although that space/strength may not be required immediately by the facility owner, it will be used eventually, and so may not remain unused for the same period that an attaching entity would desire to use it. For that reason

alone, a facility owner should be able to refuse a request for attachment on the basis of insufficient capacity.

Facility owners should be permitted to preserve and rely upon that space/strength consistent with their prior expectations. This is especially true of underground facilities such as ducts, manholes, and vaults, which cannot be readily modified after initial construction to expand available space. Electric utilities often designed and constructed such facilities for the sole purpose of providing electric service, not providing infrastructure for entirely unrelated businesses. As the Commission notes:

> Nothing in the 1996 Act suggests that Congress intended to divest incumbent [facility owners] of all or part of their local networks, [including the opportunity to] earn a reasonable profit for the interconnection services and network elements they provide ...[6]

Thus, an owner's purportedly unreasonable "refusal" to permit an attachment may simply reflect an inability to reach agreement on such issues as term of attachment and payment of future moving costs. The fundamental point is that the 1996 Act only requires nondiscriminatory access. It does not require facility owners to build facilities for and provide access to any and all entities requesting to attach.

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[6] *NPRM*, para. 11.

3. It is not possible to specify, or even require, a minimum or quantifiable threat to reliability before a utility may deny access.

UTC and EEI oppose any effort by the FCC to establish in advance a minimum or quantifiable threat to reliability before a utility may deny access under section 224(f)(2). Given the importance of reliable electric service, and the FCC's relative lack of expertise regarding the utility industry, it would be contrary to the public interest for the Commission to attempt to establish its own determination of what constitutes a threat to reliability. The basis for the Commission's regulations, whatever they may be, must be that facility owners have an innate understanding of their system requirements and are presumed to be acting in good faith. Again, the 1996 Act is pro-competition, not pro-competitor. Entities seeking attachment must carry the burden of proving that the requested access is not harmful and comports with reasonable and sound engineering/safety practices. As in most arenas, those who seek a change should bear the burden of proof (including expenses) to demonstrate the acceptability of that change. Any other course would amount to allowing an attaching entity to control the owner's facility before having contributed anything toward the construction or maintenance of that facility. That would be confiscation of a facility owner's property without compensation.

4. The FCC should not establish regulations regarding allocation of capacity.

UTC and EEI oppose the FCC's suggestion that it should establish regulations to ensure that a utility fairly and reasonably allocates capacity. The 1996 Act does not provide the FCC with authority to proscribe how a utility allocates capacity. Rather, the Act proscribes unreasonable discrimination among attaching entities in the allocation of available capacity. The Commission must not attempt to pre-define reasonable or appropriate behavior in all of the multitudinous circumstances which may (and certainly will) face facility owners as the telecommunications market evolves. However, utilities have no objection to regulations which specify the goal to be achieved — the fair and reasonable allocation of limited resources -- and procedures for resolving individual disputes, without attempting to involve the limited resources of the Commission and its staff in the day-to-day management of facilities.

IV. Notification of Modifications — Section 224(h)

The FCC notes that new Section 224(h) provides that whenever "the owner of a pole, duct, conduit, or right-of-way intends to modify or alter such pole, duct, conduit, or right-of-way," the owner must provide written notification of such action "to any entity that has obtained an attachment to such conduit or right-of-way so that such entity may have a reasonable opportunity to add to or modify its existing attachment. An entity that adds to or modifies its existing attachment after receiving such notification shall bear a proportionate share of the costs incurred by the owner in making such pole, duct, conduit or right-of-way accessible."

In implementing this provision the FCC seeks comment on whether it should establish requirements regarding the manner and timing of the notice that must be given under this provision to ensure that the recipient has a "reasonable opportunity" to add to or modify its attachment.

A. Any requirements regarding the manner and timing of notice that must be given to attaching entities to ensure attaching entities a "reasonable opportunity" to add to or modify attachments must themselves reflect reasonable facility-owner needs and ongoing business relationships

A "reasonable opportunity" cannot mean notification under all circumstances. Neither can it mean providing attaching entities an opportunity to unreasonably delay, complicate, or increase the cost of the reasonable and necessary modification activities of facility owners. Further, any such notification will take place in the context of ongoing contractual and commercial relationships, with existing lines of and protocols for inter-corporate communication. Thus, there is no need for detailed, prescriptive regulations. To the extent the Commission deems it necessary to specify minimum notification requirements, notification via first-class mail would be reasonable under normal circumstances.

However, any notification requirement should only be triggered if and when the facility owner makes an otherwise inaccessible facility accessible, and can provide notice consistent with the need to maintain the provision of service to the public. Notification should not be required at all during routine maintenance, under circumstances where modification cannot be pre-scheduled, or where modification is otherwise necessary on an immediate basis. There are many common operational reasons which preclude

specifying a stringent notification timetable or procedures because a greater priority must be placed on public welfare, safety, and/or utility service restoration.

For example, emergency repair work can be required as a result of accident, defect, or inclement weather. Prudent facility management may respond to the need for such work by initiating, or speeding up the scheduled date of, facility modification. Also, the provision of new or increased utility service may require facility modification on a very fast schedule, as specified under state law and regulation. Further, facility modification work may be required at the demand of, and under the schedule of, various state agencies such as highway or transportation departments. Under all of such circumstances, the immediate need to provide or restore service cannot be postponed to allow for notification procedures, for attaching entities to secure any necessary permits for facility modification, or to allow for any potential negotiation of scope and payment attendant to an attaching entity's desire to modify its facilities.

In addition the FCC's requirements must recognize that in the increasingly competitive utility industry it is becoming common place for electric utilities to offer service connections on an almost immediate basis. Notification requirements should not in anyway be allowed to impede utility speed of service if it can be demonstrated that the utility is acting pursuant to commitments that it has made to customers or potential customers.

Finally, any notification requirement must be reciprocal. Under no circumstances should an attaching entity make any modifications to attachments or its own facility without prior notice to, and receiving approval from, the facility owner. For instance, changing the size or type of any attachment, or increasing the size or amount of cable supported by an attachment (including overlashing existing cable with fiber-optic cable),

has safety and reliability implications which must be evaluated by the facility owner prior to the commencement of work. Moreover, facility owners must be assured that the proposed work will adequately address issues of liability, consent, and official authorization. Further, facility owners must have the right to be present while any facility modification is done in order to ensure adherence to appropriate design and safety standards.

B. The "proportionate share" of costs to be borne by attaching entities, and how such a determination should be made, is entirely case specific

The FCC seeks comment on whether to establish rules to determine the proportionate share" of the costs to be borne by each entity, and if so, how such a determination should be made.

The 1996 Act requires attaching entities to bear a portion of the "costs incurred by the owner in making [its facilities] available." Clearly, that must include the costs of notification itself — regardless of whether the attaching entity decides to avail itself of the opportunity to modify its own facilities. This recognizes that notification does not particularly benefit the facility owner, and does specifically benefit attaching entities (even if only to the extent that the facility owner is providing attaching entities with the potential for an avoided cost of individual access). Costs of notification should be directly billable, or included in the attachment rate as part of the administrative overhead of facility ownership, as dictated by individual circumstances such as established facility-owner practice or state law.

The basic principle of cost recovery should be equality — each entity utilizing the opportunity to gain access should bear an equal portion of the full cost of providing access — including any incidental actual costs such as for inspection and engineering to determine facility access and availability, and for obtaining all notices, permits, and licenses necessary for facility modification. Facility owners should also be able to allocate differing proportions of access costs to different attaching entities to the extent such entities have contributed in differing proportions to such costs. For instance, an attaching entity requiring additional licensing or additional work to implement its access or its modification, or requesting that the facility owner perform any portion of the desired work, should bear the full, actual cost of obtaining permits, accessing the facility, and doing that work, including the opportunity to earn a reasonable return.

C. Payment of the cost of access by an attaching entity is completely irrelevant to any potential increase in revenues to the facility owner by reason of its own modifications.

The FCC seeks comment on whether any payment of costs should be offset by the potential increase in revenues to the owner. In explaining the rationale for this inquiry the FCC cites an example of a pole owner modifying a pole so as to permit additional attachments, for which it can collect additional revenues. The FCC asks whether such potential revenues should offset the costs borne by the entities that already have access to the pole.

UTC and EEI strenuously object to the FCC's suggestion that payment of access costs should be offset by the potential increase in revenues. Utilities do not install larger facilities for the speculative purpose of attempting to generate revenue from attaching

entities. Section 224(h) of the 1996 Act speaks in terms of sharing the cost of providing access, not the cost or revenue of a new facility. Because attaching entities would bear no portion of the installation cost of facility from which they derive no benefit, they must not be given a credit for some hypothetical opportunity for a future revenue stream on the part of the facility owner. In addition, any such potential revenue stream is likely to be minimal when compared to the probable costs of the facility modification and administrative overhead of attempting to ascertain and allocate such a hypothetical revenue stream.

Moreover, the primary business of utilities, and the primary reason for constructing any utility facility, is the provision of safe and reliable service at reasonable rates. Facility owners do not install a facility for the speculative purpose of attempting to generate revenue from attaching entities — tariffs may even prohibit such activity. Rather, additional capacity commonly results from the inherent characteristics of the facility. For example, utility distribution poles are sized in five-foot increments — they are not sized to a utility's specific need at a particular location.

D. A facility owner's right to modify a facility and then collect a proportionate share of the costs of such modification, or a prohibition against making unnecessary or unduly burdensome modifications or specifications, is beyond the scope of Section 224(h).

Finally, the FCC asks whether it should impose any limitations on an owner's right to modify a facility and then collect a proportionate share of the costs of such modification. This issue is simply beyond the scope of this rulemaking. Section 224(h) addresses the sharing of costs of providing access for the modification of attaching equipment, including any applicable modification costs. It does not address the issue of

assessing attaching entities for some allocable share of benefits provided to them solely by the facility owner's modification of its own equipment. For instance, because the cost of moving attachments to accommodate necessary modifications by facility owners is part of the responsibility of, and overhead associated with, owning attaching equipment, attaching entities-- not facility owners -- must bear these costs.

Moreover, it would be against the self interest of facility owners to make unnecessary or unduly burdensome modifications, particularly if the costs therefor may be unrecoverable. For instance, facility owners have absolutely no incentive to increase the height of poles to such a degree that they would need to purchase a new fleet of bucket-trucks to service the higher poles. Also, electric utilities are at this very minute engaged in increased regulatory scrutiny, industry restructuring, and severe cost-cutting and downsizing. They are also faced with other pressures which would preclude engaging in unnecessary or overly costly facility modification. Moreover, the administrative overhead involved in attempting to bill for and recover facility modification costs could actually exceed the costs to be recovered.

In addition, a facility owner may elect to put in larger or stronger equipment as necessary to accommodate an expected increase in attachments arising as a result of the 1996 Act, in order to avoid unnecessary costs and administrative and operational burdens from making facility rearrangements or modifications on an ad hoc basis. Because that also benefits attaching entities, they must be assessed the costs incurred by facility owners in providing such benefits, just as they must bear all costs allocable to that entity's attachments. Otherwise, the facility owner and its customers would be subsidizing the business of the attaching entity

The primary responsibility of utilities is the provision of safe, reliable service at reasonable cost. Often, continued provision of that service has serious public health and safety importance. The provision of electric service is itself an activity demanding a high degree of care and training. Any notification requirements promulgated by the FCC for the benefit of attaching entities must reflect the primacy of the provision of utility service.

V. Conclusion

The intent of Congress in passing the 1996 Telecommunications Act was to foster competition in all telecommunication markets. In removing barriers to such increased competition, Congress did not intend in any way to decrease the safety or reliability of services already provided by existing facility owners, especially utilities. Neither did Congress intend to promote competition by requiring facility owners — particularly, utilities and their customers — to subsidize the entry of new participants into telecommunications markets.

The FCC must recognize pre-existing property rights, pre-existing contractual and commercial arrangements between facility owners and attaching entities, the large number of existing safety, operational, and engineering requirements and standards to which facility owners are already subject, and the lack of any general incentive on the part of facility owners to act unreasonably. For all of these reasons, the FCC must craft regulations which are flexible, non-prescriptive, and provide primarily for the speedy and equitable resolution of conflicts, rather than the micro-management of day-to-day facility-owner operations.